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Draft report

12. Introduction by the Special Rapporteur of the report concerning draft articles 9 and 11 to 15 *bis* of Chapter II of Part One (A/CN.4/490/Add.5 and Add.6)

(a) Introduction

1. The Special Rapporteur noted that four of the articles provided that conduct was not attributable to the State unless otherwise provided by other articles. The negative formulations contained in those four articles were devoid of content, since under article 3 it was necessary that conduct should be attributable to the State. There was also the question why the particular elements referred to, especially in articles 12 and 13, were singled out as a basis for "non-attribution". Those articles were largely unnecessary and should be deleted.

2. The remaining articles addressed four special problems concerning, respectively, attribution with respect to the organ of a State acting on behalf of another State (articles 9 and 12), international organizations acting on behalf of a State (articles 9 and 13), insurrectional movements (articles 9 and 15) and other cases (articles 11 and 15 *bis*).

3. The Special Rapporteur's recommendations were intended to retain all of the substantive content of those articles and to make certain additions to take account of State practice since their adoption.

(b) Articles 9 and 12

4. Article 9 provided that when a State lent one of its organs to another State, the conduct of the organ was attributable to the receiving State. The relatively diverse practice was reflected in the examples cited in the report. As emphasized in the commentary, that was a narrow concept which required that the organ actually be placed at the disposal of another State; that implied both that the organ should be carrying out the purposes of the receiving State and that it should be, at least at the level of policy if not of detail, under the control of that State. That limited but useful provision should be retained so far as it related to the organs of States.

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5. Article 12 was an unnecessary negative formulation; it should be deleted, and the issues that it raised should be addressed in the commentary to article 9.

(c) Articles 9 and 13

6. Article 9 also addressed situations in which an organ of an international organization was placed at the disposal of a State. It was difficult to find examples of such cases, which, at least according to some international organizations, including the United Nations itself, were inconceivable. The Special Rapporteur noted that a number of complex questions had arisen in recent years concerning the responsibility of States in relation to international organizations. However, those questions should be addressed in the context of the law of international organizations. He therefore recommended deleting that element from the draft and adding a savings clause (article A) which would make it clear that the draft articles were without prejudice to the responsibility of international organizations or of States for the conduct of international organizations.

7. Article 13 was the second unnecessary negative formulation that should be deleted.

(d) Articles 14 and 15

8. Article 15 contained two positive rules of attribution concerning insurrectional movements. In that instance, it was reasonable to begin with the negative proposition that, as a general rule, the acts of an insurrectional movement were not attributable to a State subject to the two exceptions: thus, old articles 14 and 15 would be combined into one. As to the exceptional cases, it was important to distinguish between the exceptional case in which the insurrectional movement succeeded in becoming the Government of the targeted State, on the one hand, and cases in which the insurrectional movement became part of a national reconciliation Government, on the other hand. If the Government of a State could only bring elements of an unlawful opposition movement into a new Government at the expense of assuming all the liabilities of the opposition movement, that would tend to discourage steps towards conflict resolution and national reconciliation. The exception should therefore only apply in the narrow case where the opposition movement actually defeated and replaced the Government of the State concerned.

9. The Special Rapporteur proposed that the exception should only be limited to "the conduct of an organ of an insurrectional movement" which was "established"; it should not apply to the uncoordinated conduct of its supporters.

10. Article 15 had been criticized in the literature for failing to distinguish between national liberation movements and other insurrectional movements which did not have any international status or recognition. That criticism failed to distinguish between the question of attribution and the question of the obligations incumbent upon certain movements, especially those whose higher status might be associated with greater responsibilities under international humanitarian law. That matter could be addressed in the commentary.

(e) Articles 11 and 15 *bis*

11. Article 11 was the fourth unnecessary negative formulation that should be deleted, and the rich commentary should be incorporated in the commentary to article 15 *bis*. In addition, article 11 was problematic because it indicated that the conduct of private individuals was not attributable to the State, which was not true in all cases. It was important to indicate clearly the limited extent to which private conduct was attributable to the State, but that could be done by other means.

12. Article 15 *bis* was intended to cover cases in which private conduct was subsequently adopted or acknowledged by the State, as in the *Lighthouses* or *Hostages* cases. It was important to distinguish between conduct that was merely endorsed in terms of general approval and conduct that was actually adopted by the State in the strong sense of article 15 *bis*, and the language "acknowledged or adopted as its own" was intended to achieve that. Those cases did, in fact, occur with some frequency.

13. Summary of the debate on draft articles 9 and 11 to 15 *bis*

13. Many members endorsed the excision of the negative formulations and the streamlining of the text as significant improvements.

(a) Article 9

14. Members drew attention to the need to ensure that the article was sufficiently broad to cover a variety of situations. A question was raised as to whether article 9 covered cases in which a State exercised consular relations in the interest of or on behalf of another State. The view was expressed that the article should address the relatively common phenomenon of the partial representation by one State of another State in a limited area to clarify the responsibility of the representing and represented States. It was suggested that the complex situations in which an organ exercised functions within its own competence on behalf of another State might require further consideration.

15. A question was also raised as to whether the article should cover cases in which a State was required to act by a decision of an international organization.

16. Support was expressed for the proposed retention of the article without reference to international organizations and for the proposed savings clause with respect to international organizations.

(b) Article 11

17. Support was also expressed for the proposed deletion of the article as unnecessary.

(c) Article 12

18. Support was further expressed for the proposed deletion of the article as unnecessary. On the other hand, the view was expressed that the article should be reformulated to address the points raised in paragraphs 249 to 255 of the report.

(d) Article 13

19. Support was expressed for the proposed deletion of the article as unnecessary and as consistent with the scope of the draft indicated by article 1, with importance being attached to the inclusion of the proposed savings clause.

20. A doubt was expressed concerning the proposed deletion of the article, with attention being drawn to two problems concerning the relationship between States and international organizations. First, there was the problem of States attempting to hold the headquarters State responsible for acts taken by international organizations within its territory. Second, there was the problem of a non-member State recognizing the responsibility of an international organization, which entailed the implicit recognition of its legal personality or status. If those matters were not addressed, it was considered essential to include the proposed savings clause.

(e) Articles 14 and 15

21. Agreement was expressed with the proposed merger of articles 14 and 15.

22. Some members questioned the use of the term "insurrectional movement". The view was expressed that the term "insurrectional movement" was outdated; moreover, the commentary did not reflect decolonization practices since the 1960s. The view was also expressed that the article failed to distinguish between insurrectional movements and national liberation movements which had achieved international recognition and status.

23. The remark was also made that even if the same responsibility regime applied to an insurrectional movement and a national liberation movement, the terms could not be equated given the negative connotation of the former and the positive connotation of the latter. It was suggested that consideration should be given to the responsibility implications of the recognition of an insurrectional movement or national liberation movement, possibly in Part Two of the draft. It was also suggested that an attempt should be made to find a new term.

24. A wide spectrum of civil strife was noted, ranging from internal disturbances and mob violence to an insurrectional movement or even an established de facto government on part of the territory of a State. Those distinctions needed to be clearly delineated. The view was also expressed that State responsibility was a function of effective control, not lawful control, as indicated in the *Namibia* case, and that, in consequence, the question of the status of insurrectional movements was beyond the scope of the current topic; to introduce it here would only complicate the task and create quite unnecessary difficulties. The draft should address legal questions relating to attribution in general terms to cover a variety of cases and not political questions relating to insurrectional movements.

25. It was suggested that the terms "insurrectional movement" and "national liberation movement" were both largely outdated, and that caution was advisable in discarding those terms in favour of a new term that might also date quickly. It was thus suggested that the term "insurrectional movement" could be retained in the absence of a suitable, equally broad alternative.

26. As regards paragraph 1, it was remarked that the territorial host State could be held responsible for neglecting to prevent acts of an insurrectional movement in its territory against another State. Even if the State could not be held responsible for the acts of an insurrectional movement, it could be held responsible for its own omissions in failing to prevent uncontrolled forces from causing damage in certain cases. It was also remarked that the State should be held responsible when some factions of the Government were involved in some way with or otherwise supported a rebel group which caused injury to another State or third parties, and that the draft should address the different variations, possibly in a separate article.

27. In contrast, the view was expressed that it was impossible to address every variation and that the article should do no more than establish the limits of attribution to the State in the case of insurrectional movements: remaining issues were a matter for the primary rules. The view was also expressed that it was a conceptual error to refer to State responsibility for the acts of an insurrectional movement, in contrast to the failure of the State to take the necessary preventive measures, and that such matters could be adequately addressed in the commentary.

28. Support was expressed for retaining article 15, paragraph 3, dealing with the responsibility of insurrectional movements themselves. A doubt was expressed concerning the proposed deletion of the "without prejudice" clause in paragraph 3 and the possibility of not taking account of the relevance of such issues in recent years and their influence on the development of, *inter alia*, international humanitarian law.

29. As to the cases where conduct of an insurrectional movement was attributable to the State, consideration should be given to addressing cases in which the insurrectional movement became part of the new Government or was granted a degree of autonomy within the State structure by the Government.

30. It was suggested that consideration should be given to including a "without prejudice" clause to ensure absolute clarity as to the continuing role of the primary rules, particularly those relating to the obligations of result of a State with respect to insurrectional movements. Depending on the obligation, a State was often not relieved from responsibility due to insurrection or civil strife.

31. A concern was expressed regarding proposed article 15, with paragraph 1 being described as unclear, the reference to the insurrectional movement succeeding in becoming the new Government being questioned as unnecessary in view of article 15 *bis*, and the reference to at least some of the preceding articles being questioned as unnecessary and irrelevant.

32. A question was raised concerning the use of the term "established" in the chapeau of proposed article 15. It was suggested that the phrase "established in opposition" was self-evident and unnecessary. The view was also expressed that the term "established" should be interpreted to refer to the moment when an insurrectional movement exercised effective control over part of the territory of a State, and that the responsibility of the State continued up until that moment.

(f) Article 15 *bis*

33. Support was expressed for the proposed article as addressing an important lacuna in the draft. However, the comment was made that article 15 *bis* should be concerned with cases where the acknowledgement of the earlier conduct amounted to a form of recognition of an existing situation, i.e. where it had a probative value, as distinct from cases where the adoption of conduct occurred *de novo* without any earlier involvement by the State.

34. It was suggested that the article could be redrafted as a positive formulation. It was also suggested that a savings clause concerning the responsibility of insurrectional movements or national liberation movements should be included as article 15 *bis* (2) or article 15 *ter*.

35. A question was raised concerning the necessity of that provision and the use of the word "or" rather than "and" in the concluding phrase.

14. The Special Rapporteur's concluding remarks on the debate concerning articles 9 and 11 to 15 *bis*

36. The Special Rapporteur noted that many useful comments had clarified and illuminated the general understanding of those articles. He noted that the articles created few major problems of principle, with the possible exception of article 15.

37. There was general agreement that the responsibility of international organizations and of States for acts of international organizations were important subjects that were worthy of study in their own right but that they raised problems that went well beyond questions of attribution. The wisest course of action would be to exclude them from the current draft. That exclusion necessitated a savings clause since attribution issues were involved. It had been suggested that the savings clause should cover acts carried out within the framework of an international organization as well as the acts of the international organization itself. On the other hand, States could assume individual responsibilities in the context of conduct

which took place in the forum of an international organization, and that distinction needed to be recognized.

38. Article 9 had received general approval. Although some examples or organs placed at the disposal of another State might be considered vestiges of colonialism, there were other examples where the consent of the States concerned had been given freely. The omission of the article would create problems concerning the breadth of article 5.

39. There was general agreement that the negative formulations contained in articles 11 to 14 were unnecessary and could be deleted, with any useful elements being addressed in the commentary. The problem raised concerning the conduct of one State in the territory of another State required further reflection, possibly in chapter IV of Part One.

40. There was also general agreement concerning the proposed merger of articles 14 and 15. The Drafting Committee should consider whether new article 15 should be formulated in the negative or in the positive. Given the general support for retaining the reference to territorial governmental entities in article 5, consideration should be given to the relationship between articles 5 and 15. The Special Rapporteur still believed that the term "established" was necessary to indicate a threshold for the insurrectional movements for purposes of article 15, and to distinguish between territorial governmental entities and de facto administrations covered by articles 5 and 15 respectively.

41. Questions of terminology raised with respect to the terms "insurrectional movements" and "national liberation movements" should be considered by the Drafting Committee. It might be necessary to include a brief introductory article in the draft to indicate that its scope was limited to the responsibility of States and did not extend, for example, to the responsibility of insurrectional movements.

42. Finally, there was general agreement concerning the need for proposed article 15 *bis*. The useful suggestions regarding the formulation of the article should be considered by the Drafting Committee.